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No. 95-1762

In the Supreme Court of the United States

OCTOBER TERM, 1995

BERNARD DEANNUNTIS, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were denied a speedy trial in violation of the Sixth Amendment.

2. Whether the district court committed plain error in determining that petitioners' false statement was material rather than submitting the materiality element to the jury.

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OPINIONS BELOW

The judgment orders of the court of appeals (Pet. App. 1a-4a) are unreported, but the decisions are noted at 77 F.3d 474 (Table).

JURISDICTION

The judgments of the court of appeals were entered on January 31, 1996. The petition for a writ of certiorari was filed on April 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner DeAnnuntis and petitioner Atlantic Science and Technology, Inc. (AS&T) were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; making a false claim against the United States, in violation of 18 U.S.C. 287; and making a false statement, in violation of 18 U.S.C. 1001. Petitioner DeAnnuntis was sentenced to probation and a fine. Petitioner AS&T was sentenced to a $30,000 fine. The court of appeals affirmed. Pet. App. 1a-4a.

1. DeAnnuntis was the founder, owner, and a vice-president of AS&T, a private contractor that did business with the Federal Aviation Administration (FAA) Technical Center near Atlantic City, New Jersey. In 1985, DeAnnuntis and Cesar Caiafa, a FAA employee, conspired to obtain a government contract for AS&T by fraudulent means. The contract was to prepare a study relating to the airworthiness and certification of certain aircraft structures constructed of non-metallic materials. DeAnnuntis submitted a bid of $9,500 for the contract, which was below the $10,000 threshold for requiring competitive bidding. He had secretly arranged with Caiafa, however, to modify the contract later to pay AS&T an additional $6,800. During 1986, DeAnnuntis directed AS&T employee Ramon Garcia to bill some of his time to the FAA project even though Garcia did no work on the contract. Later, AS&T sent a bill to the FAA for $9,500. Lawrence Neri, an FAA official, falsely certified that AS&T was entitled to payment because it had fully satisfied the contract. As part of

the conspiracy, DeAnnuntis paid kickbacks to Caiafa. Gov't C.A. Br. 2-6.

In December 1986, AS&T submitted what it represented was a report to the FAA pursuant to the contract. In fact, the report had been cut-and-pasted together by Caiafa and Neri from previous reports prepared by FAA officials. Several days later, AS&T submitted a bill for an additional $6,800 to the FAA as payment for the report. Gov't C.A. Br. 6-7.

2. In 1988, the government commenced an investigation of AS&T. The Department of Defense and the Department of Transportation (DOT) worked jointly on an investigation in the Eastern District of Pennsylvania; meanwhile, the DOT and the FBI initiated a separate investigation in the District of New Jersey. On October 24, 1991, petitioners, Caiafa, and another FAA employee were indicted in the District of New Jersey. The government moved to seal the indictment because it was conducting a large, and as yet undisclosed, investigation at the FAA center in New Jersey, and it had several prospective witnesses, including Garcia, cooperating in that investigation. The district court granted that motion. In April 1994, the indictment was unsealed. Pet. App. 24a-25a.

In June 1994, petitioners moved to dismiss the indictment, claiming that their Sixth Amendment right to a speedy trial had been violated. In September 1994, the district court, after conducting a hearing, denied the motion. Applying the multi-factor test of *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972), the court held, first, that the 30-month delay between indictment and arrest was sufficient to require consideration of the cause for the delay and whether it had prejudiced petitioners, but that the delay did not give rise to a

presumption of prejudice. Pet. App. 30a-31a. The court then held that the delay had been reasonable, because it had resulted from the need to protect an ongoing investigation, *id.* at 31a, and that petitioners had failed to establish that the delay had prejudiced them. *Id.* at 31a-32a. Petitioners' trial began in October 1994. *Id.* at 24a-32a.

3. The Section 1001 count was based on the defendants' concealment of the fact that Caiafa and Neri—and not any AS&T employee—had written the report submitted to the FAA by AS&T. Petitioners' defense to that charge was that they had fully complied with their obligations under the contract with the FAA because, in their view, the contract did not require them to submit a final report to the FAA. At trial, the district court instructed the jury that, although materiality was an element of the Section 1001 charge, it was to be decided by the court. Petitioners did not object to that charge. The court found the fact, concealed by petitioners, that AS&T had not itself prepared the report to have been material. Pet. App. 12; Gov't C.A. Br. 46-51.

4. The court of appeals summarily affirmed petitioners' convictions in separate judgment orders. Pet. App. 1a-4a.

ARGUMENT

1. Petitioners first contend (Pet. 5-10) that the three-year period between their indictment and the commencement of trial violated their Sixth Amendment right to a speedy trial. In relying on *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972) and *Doggett* v. *United States*, 505 U.S. 647, 651 (1992), the district court applied the proper doctrinal test to that claim, and its application of that test was correct.

Under *Barker* and *Doggett*, a claim that a defendant's Sixth Amendment right to a speedy trial has been violated turns on a consideration of four factors: the length of the delay, the reason for the delay, whether the defendant asserted his right to a speedy trial, and whether the defendant was prejudiced by the delay. *Doggett*, 505 U.S. at 651; *Barker*, 407 U.S. at 530. As this Court has held, the length of the delay is a "triggering mechanism," in that, "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity to inquire into the other factors that go into the balance." *Barker*, 407 U.S. at 530. In cases where an indictment has been sealed and where the defendant was not previously arrested, the pertinent time period for determining whether the defendant's Sixth Amendment right to a speedy trial has been violated commences at the time that the indictment is unsealed. See *United States* v. *Lewis*, 907 F.2d 773, 774 & n.3 (8th Cir.), cert. denied, 498 U.S. 906 (1990); *United States* v. *Watson*, 599 F.2d 1149, 1156-1157 & n.5 (2d Cir. 1979), modified on other grounds, *United States* v. *Muse*, 633 F.2d 1041 (2d Cir. 1980) (en banc), cert. denied, 450 U.S. 984 (1981); *United States* v. *Hay*, 527 F.2d 990, 994 & n.4 (10th Cir. 1975), cert. denied, 425 U.S. 935 (1976).[1]

In this case, only six months passed between the unsealing of the indictment and petitioners' trial. That period was too short to warrant consideration of

[1] The constitutional right to a speedy trial is not activated until a criminal prosecution has commenced. See *United States* v. *Marion*, 404 U.S. 307, 313 (1971). As this Court has noted, other mechanisms exist to guard against pre-indictment delay, including the applicable statute of limitations and the Due Process Clause. *Id.* at 322; see also *Watson*, 599 F.2d at 1156-1157 n.5.

the other *Barker* factors. See *Doggett*, 505 U.S. at 652 n.1 (noting that one-year delay is the time that normally triggers consideration of the other *Barker* factors). But, even if those factors were considered, they offer no support for petitioners' Sixth Amendment claim, as the district court found. First, the sealing of the indictment for 30 months was prompted by the government's ongoing investigation into corruption at the FAA center. The need to prevent disclosure of an ongoing investigation is a legitimate ground for sealing an indictment and thereby delaying trial. See *United States* v. *Richard*, 943 F.2d 115, 118-119 (1st Cir. 1991); *United States* v. *Lakin*, 875 F.2d 168, 170-171 (8th Cir. 1989); *United States* v. *Ramey*, 791 F.2d 317, 320-321 (4th Cir. 1986); *United States* v. *Srulowitz*, 819 F.2d 37, 40 (2d Cir.), cert. denied, 484 U.S. 853 (1987).

Moreover, as the district court found, petitioners have not demonstrated that the delay prejudiced their defense. Petitioners argue that, in 1993, certain business records and computer discs were destroyed after a line investigator with a defense agency not employed by the FBI, the Defense Department, or the Department of the Treasury, informed them that the investigation had been completed. As the district court noted, however, petitioners failed to establish that they reasonably relied on the investigator's statement or that the lost documents would have assisted their defense. Pet. App. 32a. In any event, petitioners' conclusory claim of prejudice was insufficient to show actual prejudice. See *Doggett*, 505 U.S. at 656 (defendant must show "specific prejudice" when government has proceeded with reasonable

diligence); *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986).[2]

2. Petitioners also claim (Pet. 10-13) that the district court committed plain error in deciding the question of whether petitioners' statement was materially false, rather than submitting that question to the jury. That claim also does not merit review. In *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), the Court held that, where materiality is an element of an offense, the Constitution requires that the jury determine whether that element has been established. Petitioners, whose trial occurred before *Gaudin* was decided, did not object to the district court's instruction. Accordingly, petitioners' claim is reviewed only for plain error. *United States* v. *Olano*, 507 U.S. 725 (1993). See *United States* v. *Gaudin*, 115 S. Ct. at 2320-2322 (Rehnquist, C.J., concurring). To establish plain error, a defendant must show that an error was committed, that the error was plain under current law, and that the error affected substantial rights. Even when that showing has been made, a reviewing court has discretion whether to correct the forfeited error, and should do so only when the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at 731-732.

In considering claims similar to petitioners', several courts of appeals have held that a *Gaudin* error, occurring in a trial before *Gaudin* was decided, is "plain" within the meaning of *Olano*. See, *e.g.*,

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[2] While petitioners satisfied the third *Barker* factor by asserting their right to a speedy trial shortly after the indictment was unsealed (Pet. App. 30a n.1), that factor alone is insufficient to establish a violation of the Sixth Amendment.

United States v. *David*, 83 F.3d 638, 645-646 (4th Cir. 1996); *United States* v. *Randazzo*, 80 F.3d 623, 630-632 (1st Cir. 1996); *United States* v. *McGuire*, 79 F.3d 1396, 1400-1405 (5th Cir. 1996). Whether a *Gaudin* error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, however, is a case-specific inquiry that depends on such variables as the strength of the government's case on the issue of materiality and the extent to which the issue of materiality was disputed at trial. See *David*, 83 F.3d at 648.[3] Thus, where the government presents overwhelming evidence of guilt on the materiality element, reversal is not warranted. Compare *Randazzo*, 80 F.3d at 632 (conviction affirmed because evidence of guilt overwhelming) with *David*, 83 F.3d at 648 (conviction reversed because, among other things, the jury "could conceivably have concluded" that false statements were not material) and *McGuire*, 79 F.3d at 1405 (conviction reversed because of serious factual question regarding materiality).

The fact-specific question whether reversal was required in this case does not merit this Court's review. In any event, the court of appeals was correct in holding that petitioners' *Gaudin* claim did not merit reversal. To establish materiality, the government had to show that the information that petitioners concealed had a natural tendency to influence,

[3] The Ninth Circuit has recently granted rehearing en banc to consider this prong of the plain error inquiry in a case involving *Gaudin* error. See *United States* v. *Keys*, 78 F.3d 465 (9th Cir. 1996) (granting rehearing en banc in *United States* v. *Keys*, 67 F.3d 801, 811 (9th Cir. 1995) (holding that *Gaudin* error does not "seriously affect the fairness, integrity, or public reputation of judicial proceedings" when there was no "serious factual question" regarding materiality at trial)).

or was capable of influencing, the decision of the FAA. *Gaudin*, 115 S. Ct. at 2313. Here, the government's evidence showed that petitioners submitted a document that purported to be an independent report to the FAA but that, in fact, had been written by FAA personnel. Petitioners' submission for reimbursement based on the false pretense that they had complied with the contract by preparing that report was material, because "a claim based on a service that was not performed is * * * a material misstatement." *United States* v. *Adler*, 623 F.2d 1287, 1291 (8th Cir. 1980). Moreover, petitioners did not argue that, if the contract required AS&T to prepare a report for the FAA, the fact that the report had actually been prepared by FAA officials would be immaterial. Rather, they argued that the contract did not require the preparation of a report by AS&T, but merely required AS&T to present its own research to the FAA. That issue was submitted to the jury in connection with the element requiring it to find that the defendants had concealed information from the FAA. Gov't C.A. Br. 27. Under those circumstances, the court of appeals was correct to recognize that the *Gaudin* error did not seriously affect the fairness, integrity, or public reputation of the proceedings below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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